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Supreme Court of the United States

October Term, 1941

No. 203

H. G. RYAN and L. G. HOWARD, Trading as KEYSTONE TRANSFER COMPANY,

Petitioners,

vs.

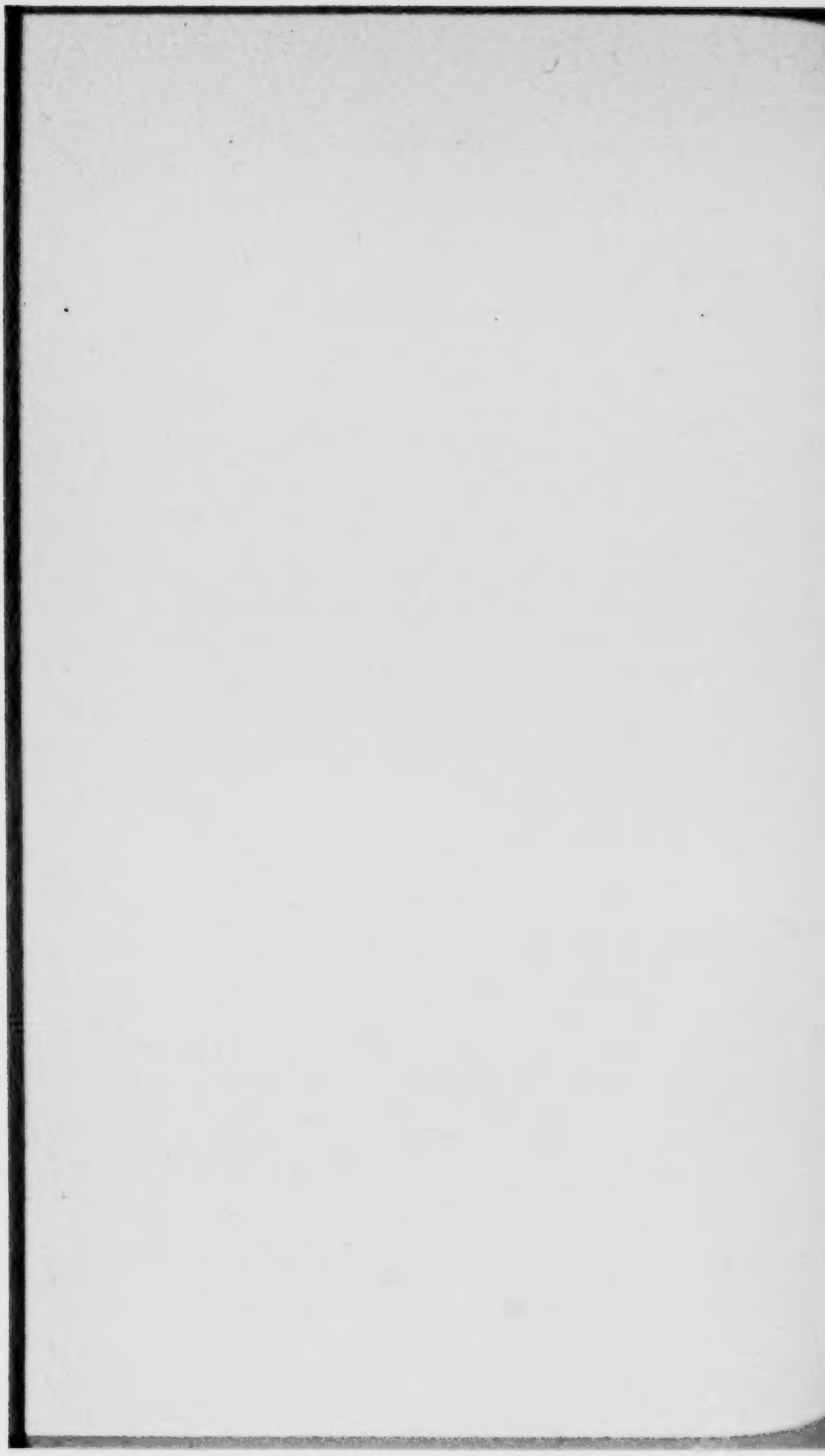
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION OF THE COURT BELOW

The opinion of the Superior Court of Pennsylvania may be found in the Record in this case at page 489. It is officially reported in 143 Pa. Superior Ct. 517; 17 Atl. (2nd) 637.

COUNTER-STATEMENT OF THE CASE

In 1920 the petitioner-partnership was formed, with its principal office in Uniontown, Pennsylvania, and began as a common carrier to transport property by motor vehicle. In 1934 the petitioner established a terminal at Wheeling, West Virginia. Between 1933 and 1939 petitioner was granted certain certificates of public convenience by the Pennsylvania Public Utility Commission, to transport named commodities in intrastate commerce by motor vehicle.

On September 5, 1939, the Interstate Commerce Commission, under the provisions of the "Grandfather Clause" of the Federal Motor Carrier Act of 1935 (49 U. S. C. A. 306a), issued to the petitioner a provisional certificate permitting it to operate as a common carrier by motor vehicle in interstate or foreign commerce over certain designated routes between Wheeling, West Virginia, and Pittsburgh, Pennsylvania; between Wheeling, West Virginia, and Uniontown, Pennsylvania, and between certain points in Pennsylvania, including Pittsburgh, over U. S. Highway Route 19, to Washington, Pennsylvania.

All of petitioner's freight, both interstate and intrastate (except those commodities for which it had intrastate certificates, and certain property moving in interstate commerce) originating in Pittsburgh and destined for Uniontown or Washington, Pennsylvania, was shipped by trucks to petitioner's terminal at Wheeling, West Virginia, where it was unloaded and assorted. There the freight shipped from West Virginia and Ohio, as well as that originating in and for delivery in

Pennsylvania, was loaded in another truck and delivered to either Washington or Uniontown.

In transporting goods from Pittsburgh to Washington, Pennsylvania, via Wheeling, petitioner traveled 89 or 90 miles, depending upon which of two routes was traversed, while the direct way, and wholly within Pennsylvania, is a distance of only 29 miles. Also petitioner's trucks in making deliveries to Washington of freight not within one of its intrastate certificates, would go to Washington, continue 30 miles beyond to Wheeling, where the goods were put into another truck and then carried back to Washington. The same plan was followed in making deliveries from Pittsburgh to Uniontown, which by the direct intrastate route is only 52 miles distant from Pittsburgh. In transporting goods via Wheeling the petitioner's trucks traveled either 127 or 128 miles to get to Uniontown,—more than twice as far as the direct intrastate route.

The Pennsylvania Public Utility Commission held that the hauling of goods between points in Pennsylvania, via Wheeling, West Virginia, in the manner described above, was a subterfuge to avoid the jurisdiction of that Commission. The Commission thereupon entered a final order to cease and desist and imposed a penalty upon the petitioner in the sum of $1500. This final order was affirmed by the Superior Court of Pennsylvania (R. 489). The Supreme Court of Pennsylvania refused to allow an appeal from the order of the Superior Court (R. 504).

STATUTES INVOLVED

The following sections and parts thereof, of the Public Utility Law of Pennsylvania, Act of May 28, 1937, Pa. P. L. 1053—

The relevant parts of Section 1101(66 Purdon's Statutes 1431) are as follows:

> "Appeals to Courts; Jurisdiction and Practice. (a) Within thirty days after the service of any order by the Commission, unless an application for a rehearing may be pending, and then within thirty days after the service of the order refusing such application, or the service of an order modifying, amending, rescinding, or affirming the original order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court. Such court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all such appeals: * * *
>
> "(b) All appeals to the Superior Court shall be by petition, setting forth specifically and concisely the error or errors assigned to the order of the commission, which petition shall be accompanied by a copy of the order appealed from, and shall also be accompanied by affidavit of the appellant, or of the agent or attorney of such appellant, that the appeal is not taken for the purpose of delay, but because the appellant verily believes that injustice has been done. Each error relied on must

be specified particularly and set forth in a separate numbered paragraph of the petition."

Section 1102 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1432) reads as follows:

"Notice of Appeal; Certification of Record and Costs of Certification.—The commission shall be immediately notified in writing by the appellant of the taking of an appeal, and within a reasonable time after service of such notice, shall certify, under its official seal, to the proper court as hereinbefore provided, the record of such proceedings, which record shall include the evidence taken therein, a copy of all orders made by the commission in such proceedings, and a copy of the opinion, if any, filed by the commission before or after notice of appeal. The cost of preparing and certifying such record shall be paid to the commission by the appellant and taxed as part of the costs in the case to be paid as directed by the court upon the final determination of the appeal."

Section 1107 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1437) reads as follows:

"Record on Appeal; Scope of Inquiry; and Disposition of Costs.—Any appeal to the Superior Court shall be determined upon the record certified by the commission to the court. All evidence in such record so certified may be considered by the court regardless of any technical rule which might

have rendered the same inadmissible, if originally offered in the trial of an action at law. The court may dismiss the appeal, or vacate the order complained of, in whole or in part. In case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the decree, as in the opinion of the court justice may require. The order of the Commission shall not be vacated or set aside, either in whole or in part, except for error of law or lack of evidence to support the finding, determination, or order of the commission, or violation of constitutional rights. The costs resulting from any appeal shall be upon the appellant, unless the court shall make other disposition of the costs in its decree.

Section 1109 of the Public Utility Law of Pennsylvania, supra, (66 Purdon's Statutes 1439) reads as follows:

"Appeals to Supreme Court.—Within thirty days after the entry of any final judgment, order, or decree of the Superior Court, any party to the record, aggrieved thereby, may appeal therefrom to the Supreme Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be especially allowed by the Superior Court itself, or by any one justice of the Supreme Court.

> Such appeals shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

The Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) is the only Federal statute involved. The sections of this Statute which are material to our argument are quoted in that portion of our Brief.

QUESTIONS PRESENTED FOR REVIEW.

I. DID THE SUPREME COURT OF PENNSYLVANIA IN REFUSING TO ALLOW AN APPEAL BY THE PETITIONER, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

II. DOES A STATE HAVE THE RIGHT TO DETERMINE WHETHER THE TRANSPORTATION OF FREIGHT BETWEEN POINTS IN THAT STATE THROUGH ANOTHER STATE, OVER AN INDIRECT ROUTE, WHERE THERE IS A MORE DIRECT ROUTE AVAILABLE, IS NOT BONA FIDE INTERSTATE COMMERCE BUT A SUBTERFUGE TO AVOID STATE REGULATION?

ARGUMENT

I. THE SUPREME COURT OF PENNSYLVANIA IN REFUSING TO ALLOW AN APPEAL BY THE PETITIONER, DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is no merit in the contention of the petitioner that the refusal of the Supreme Court of Pennsylvania to allow an appeal from the Superior Court of that State violated the due process clause of the Fourteenth Amendment of the Federal Constitution. Under the provisions of Section 1101 of the Public Utility Law, supra, the petitioner duly filed its appeal with the Superior Court of Pennsylvania. In that appeal the petitioner was afforded a full opportunity to raise all constitutional and other questions. In passing upon the questions raised by the petitioner the Court had before it the entire record of the Pennsylvania Commission.

The opinion of the Superior Court is reported in 143 Pennsylvania Superior Court, page 517, and in 17 Atlantic Reports (2nd Series) page 637, and also appears in the Record of the present proceeding (R. 489). In its opinion the Superior Court in passing upon the scope of the judicial review required by the Public Utility Law, said (R. 495):

> "We are limited in determining whether there is any error of law or lack of evidence to support

the order of the Commission, or violation of any constitutional right."

The right of appeal to the Superior Court, allowed by the Public Utility Law, plainly satisfies the requirements of the due process clause of the Fourteenth Amendment of the Federal Constitution: **Ohio v. Akron Park District,** 281 U. S. 74-80 (1929). The due process clause thus having been satisfied by a judicial review of the case by the Superior Court, we submit that the **Supreme Court of Pennsylvania in refusing to allow the appeal, did not deprive the petitioner of any constitutional right:** See **Ohio v. Akron Park District,** supra.

If the petitioner has any procedural right to appeal to the Supreme Court of Pennsylvania, it derives that right from Section 1109 of the Public Utility Law, supra. In considering petitions for allowance of an appeal under the provisions of this section the Supreme Court has on different occasions refused to grant the appeal as it did in the instant case (R. 504). This section has been interpreted by the Supreme Court as giving it the power and authority to dispose of the appeal upon the petition. The absence of an opinion by the Supreme Court does not affect the quality of its decision, or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the petitioner: **Napa Valley Electric Company vs. Railroad Commission of California,** 251 U. S. 366 (1919).

The petitioner does not question the validity of Section 1109 of the Public Utility Law, supra, but does

question the interpretation placed thereon by the Supreme Court of Pennsylvania in refusing to grant an appeal in this case. **Where a State Law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction: Commercial Bank vs. Buckingham,** 5 Howard 317; **Scott v. Jones,** 5 Howard 343; **Congdon Mining Company v. Goodman,** 2 Black 574.

We, therefore, submit that the petitioner has not been deprived of any right under the due process clause of the Fourteenth Amendment of the Federal Constitution, and that the construction of a State statute, providing for an appeal to the Supreme Court of that State, **does not present a Federal question when the validity of that statute is not questioned: Grand Gulf Railroad & Banking Company v. Marshall,** 12 Howard 165; **Ferry v. King County,** 141 U. S. 668; **Snell vs. Chicago,** 152 U. S. 191.

II. A STATE HAS THE RIGHT TO DETERMINE WHETHER THE TRANSPORTATION OF FREIGHT BETWEEN POINTS IN THAT STATE THROUGH ANOTHER STATE, OVER AN INDIRECT ROUTE, WHERE THERE IS A MORE DIRECT ROUTE AVAILABLE, IS NOT BONA FIDE INTERSTATE COMMERCE BUT A SUBTERFUGE TO AVOID STATE REGULATION.

Petitioner contends that the Commonwealth of Pennsylvania is precluded from determining whether or not

its operations between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, and between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, is not bona fide interstate commerce but a subterfuge to avoid state regulation. Petitioner in support of its contention relies upon a provisional certificate issued to it by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) and upon the proposition that the Federal government has occupied this field of interstate commerce by said Act.

We respectfully submit that the contentions of the petitioner are not supported by judicial pronouncements of the courts.

In **Grubb v. Public Utilities Commission of Ohio et al.**, 281 U. S. 470, your Honorable Court held that state and federal courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, including the Commerce Clause, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. This raises the question of whether or not the Federal Government by the Federal Motor Carrier Act has so occupied the field as to prohibit a state commission or a state court from determining that certain interstate commerce is not bona fide but a subterfuge to avoid state regulation as intrastate commerce.

Prior to the passage of the Federal Motor Carrier Act, it was held in **Inter-City Coach Co. v. Atwood et al.**, 21 Federal (2d) 83 (1927), that to constitute "interstate commerce" by a bus line, it was not suffi-

cient that its busses cross a state line but that they must transport passengers or goods interstate or be intended in good faith to do so. The Court said on page 85:

> "* * * In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry.
>
> "Freedom of commercial intercourse between the states, as the Supreme Court has repeatedly held, is of such paramount importance that interference with it by the states cannot be permitted; and the powers of the states have been restricted accordingly. Western Union Tel. Co. vs. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355. **But the commerce thus protected is real commerce. It has never been held, and we believe never intended, that a mere fiction of interstate commerce may be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways in intrastate commerce.** Interstate Busses v. Holyoke Street R. Co., 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530." (Emphasis ours).

(Appeal refused by Supreme Court, 278 U. S. 663).

The Superior Court of Pennsylvania in passing upon a factual situation identical with the instant case, and similar to the **Inter-City Coach Company v. Atwood,** supra., quoted the above language in **Blackmore et al. v. Public Service Commission,** 120 Pa. Superior Court 437, and said further on page 448:

"* * * As we have indicated the question of subterfuge is one of fact to be determined by the commission, * * *."

We submit that under the law, prior to the passage of the Federal Motor Carrier Act, it was an established principle that a state could determine whether or not a motor carrier was engaged in bona fide interstate transportation or was operating as a subterfuge.

A review of the Federal Motor Carrier Act (49 U. S. C. A. 301 et seq.) does not reveal an intention of Congress to exclude the authority of states to pass upon the question as to whether or not an operation is bona fide interstate commerce or a subterfuge. Section 302 Title 49 U. S. C. A. contains a "Declaration of policy and delegation of jurisdiction to Interstate Commerce Commission." By subdivision (a) of said section, it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof * * * in the administration and enforcement of this chapter." And then by subdivision (c):

> "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise of each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof. (Feb. 4, 1887, c. 104, Part II, 202, as added Aug. 9, 1935, c. 498, 49 Stat. 543.)"

This section clearly shows that Congress intended to leave with each State the exclusive right to regulate

and control intrastate commerce by motor carriers on the highways of such States. This exclusive right could not be exercised properly if a State had no power to determine that an operation between points in that State, through another State, was not bona fide interstate commerce.

Whatever right the petitioner has to transport goods in interstate commerce, it derives that right from a provisional certificate issued by the Interstate Commerce Commission under the so-called "Grandfather Clause" of the Federal Motor Carrier Act (49 U. S. C. A. 306a), which provides:

> "* * * Provided, however, that * * * if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings * * * and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate * * * pending the determination of any such application the continuance of such operation shall be lawful."

It is clearly to be seen that the "Grandfather Clause" applies only to that transportation which was bona fide

interstate commerce. The petitioner contends that it is protected by this proviso. We submit that this contention is contrary to what was held by your Honorable Court in **McDonald v. Thompson,** 305 U. S. 263 (1938), wherein Mr. Justice Butler said on pages 266-267:

> "Exact definition of 'bona fide operation' is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. Piedmont & Northern Ry. Co. v. Interstate Commission, 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate 'bona fide'. That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. Ginsberg & Sons v. Popkin, 285 U. S. 204, 208. Ex Parte Public National Bank, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. **The expression, 'in bona fide operation, suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.**
>
> "As petitioner is not protected in his operation as a common carrier by the proviso, we need not

consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner." (Emphasis ours).

The operations of the petitioner, complained against by the Pennsylvania Commission, were held by the Superior Court of Pennsylvania in its opinion in this case (Record 489), to be in fact intrastate operations for which the petitioner had no certificate and was, therefore, in violation of the laws of the Commonwealth of Pennsylvania.

It is argued that the Pennsylvania Public Utility Commission has no jurisdiction to determine the issue of whether or not petitioner's operations constituted a subterfuge to evade regulation by it, but that the State was precluded from such jurisdiction by the Interstate Commerce Commission issuing a provisional certificate.

It is respectfully submitted that the Pennsylvania Public Utility Commission is not powerless to protect the intrastate commerce of the Commonwealth of Pennsylvania.

The case of **Eichholz v. Public Service Commission of Missouri,** 306 U. S. 268 (1939), is clear authority that a state commission has jurisdiction to determine the question of subterfuge when the Interstate Commerce Commission has not, as yet, finally acted upon the application of the carried filed with it. In that case, Eichholz had held a permit from the Missouri Public Service Commission to operate as a motor carrier over the highways of Missouri between points in Missouri and

points beyond the state exclusively in interstate commerce. He did not hold an intrastate permit. Upon the passage of the Federal Motor Carrier Act he applied for a permit under the "Grandfather Clause" from the Interstate Commerce Commission, and at the time of argument in your Honorable Court his application was still pending.

The Missouri Commission revoked the interstate permit issued by it to Eichholz on the ground that he had unlawfully engaged in intrastate commerce under the pretense of transporting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and vice versa, through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. Eichholz thereupon filed a bill in equity before a three-judge federal statutory court under the provisions of Section 266 of the Judicial Code to enjoin action of the Commission. The District Court dismissed the bill and Eichholz appealed to your Honorable Court.

The then Chief Justice Hughes, speaking for a unanimous court, affirmed the lower court and pointed out that the application of appellant filed with the Interstate Commerce Commission was still pending and at page 274, said:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was

actually interstate transportation. Hanley vs. Kansas City Southern Ry. Co., 187 U. S. 617; Western Union Telegraph Co. v. Speight, 254 U. S. 17; Missouri Pacific R. Co. v. Stroud, 267 U. S. 404. That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. **But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected.** Cooley v. Board of Wardens, 12 How. 299, 319; Morgan's S. S. Co. v. Louisiana, 118 U. S. 455; Smith v. Alabama, 124 U. S. 465; Kelly v. Washington, 302 U. S. 1, 9, 10. * * * (Emphasis ours).

The present case is exactly similar to the above case. The application of petitioner before the Interstate Commerce Commission has not, as yet, been finally adjudicated. The record in this appeal shows that the Interstate Commerce Commission, on September 5, 1939, issued to appellants a compliance order which grants them provisional authority to operate over the routes described therein (R. 373). **That is not a final adjudication of their application.**

The Superior Court of Pennsylvania, in its opinion in the instant case, recognized the facts in this case to be identical with those in the Eichholz case by saying (R. 495):

> "The Federal Motor Carrier Act of August 9, 1935 (49 U. S. C. A. 302c) expressly recognized the right of the several states to regulate intrastate carriage. The Supreme Court of the United States **in the Eicholtz case, supra, which involved a situation substantially analogous to the present case,** very definitely state that a state Commission has jurisdiction to determine the question whether carrying merchandise across state lines is bona fide or a mere subterfuge to evade the state Commission's jurisdiction. It ruled, p. 273, that mere pendency before the Interstate Commerce Commission of an application by a motor carrier to operate under the Federal Motor Carrier Act in interstate commerce did not supersede the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic on the state highways. * * * *" (Emphasis ours).

Petitioner has argued at pages 10 and 11 of its Brief that the routes traveled by it have been authorized by the Interstate Commerce Commission (Record 373), and that by virtue of a regulation of the Interstate Commerce Commission dated April 3, 1940 (Petitioner's Brief, page 11) it was permitted to combine its routes and render the service here in question. However, the petitioner admits on page 11 of its Brief, that this regulation of the Interstate Commerce Commission, permitting a combination of routes, has been vacated; and it further admits that this regulation has no effect upon its rights, but that those rights are to be determined as of the time of the issuance of its compliance order, and/or at the time of the complaint being brought.

We respectfully submit that there is no provision in the compliance order authorizing transportation between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, nor between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, nor any right to combine any of the routes described therein.

Section 208a of the Federal Motor Carrier Act (49 U. S. C. A. 308a) states that:

> "Any certificate issued * * * shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which * * * the motor carrier is authorized to operate;"

The compliance order (R. 373) gives the "regular routes, between fixed termini * * * as specified" (R.375). There then appears a list of regular routes and fixed termini, included in which are the routes and the termini mentioned above. The compliance order clearly states that (R. 374) * * * **applicant shall not engage in any motor carrier operation not described herein or otherwise lawfully authorized."** (Emphasis ours).

Thus it is clearly to be seen that the compliance order does not authorize petitioner to render the service in question here, and under all the law and facts in this case, the Commonwealth of Pennsylvania was not precluded from determining that said operations did not constitute bona fide interstate commerce **but were a subterfuge and in violation of the laws of the Commonwealth.**

We have carefully reviewed the cases cited by petitioner in its Brief and respectfully submit that the principles enunciated therein are not controlling or decisive of the issues here in question.

CONCLUSION

Under the law and the facts, we respectfully urge your Honorable Court to deny the prayer of the petition for Writ of Certiorari.

Respectfully submitted,

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